

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. In his decision the magistrate concluded the commission (1) did not violate Ohio Adm.Code 4121-3-34(D)(3)(i) and (2) did not abuse its discretion in assessing the nonmedical factors. Accordingly, the magistrate determined the requested writ should be denied.

{¶3} Relator filed an objection to the magistrate's decision:

RELATOR OBJECTS TO THE MAGISTRATE'S FINDING THAT THE INDUSTRIAL COMMISSION OF OHIO DID NOT VIOLATE OHIO ADMINISTRATIVE CODE 4121-3-34(D)(3)(i).

Relator's objection reargues the same issue resolved in the magistrate's decision. For the reasons set forth in the magistrate's decision, the objection is not persuasive.

II. Objection

{¶4} Relator's single objection contends the staff hearing officer failed to comply with Ohio Adm.Code 4121-3-34(D)(3)(i) in resolving relator's application for permanent total disability compensation. The provision applies to "claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment." It requires the staff hearing officer to "consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment." Contrary to relator's objection, the staff hearing officer complied with the administrative code provision.

{¶5} As a result of his industrial injury, relator had both psychological and physical aspects to his request for permanent total disability compensation. In resolving relator's request, the staff hearing officer assessed relator's residual functional capacity, a term set forth in Ohio Adm.Code 4121-3-34(B)(4) that "means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions of the claim(s)." The staff hearing officer reviewed both the report of Elizabeth Mease, M.D., that addressed relator's physical restrictions and the report of Marian Chatterjee, Ph.D., that addressed relator's psychological functional capacity. In each instance the staff hearing officer noted the restrictions each doctor reported as a result of the allowed conditions.

{¶6} Based on those reports, the staff hearing officer concluded that, in light of the allowed conditions, relator "retains the residual functional capacity to perform sustained remunerative employment at the sedentary and light work level, physically and some sustained remunerative employment, as limited for Dr. Chatterjee's opinion." As a whole, the staff hearing officer's decision complies with the administrative provision that requires the allowed psychiatric condition to be considered in combination with the allowed physical condition.

{¶7} Relator nonetheless points to the conclusion of the staff hearing officer's order where, based on "the above findings," the staff hearing officer determined that when relator's "non-medical disability factors are considered in conjunction with the medical restrictions and limitations as opined by Drs. Mease and Chatterjee," relator "retains the capacity to perform sustained remunerative employment at the sedentary and light work levels." (Magistrate's Decision, ¶18.) While not as explicit as the earlier portions of the

order, the staff hearing officer nonetheless considered the restrictions and limitations that both Drs. Mease and Chatterjee imposed.

{¶8} In the end, relator's contentions invoke the formerly required "combined effects" review that arose when the claimant presented both physical and psychological dimensions in a request for disability compensation. Under such a review, typically a single doctor assessed a claimant's ability in light of the combined effects of the allowed physical and psychological conditions. Ohio Adm.Code 4121-3-34(D)(3)(i) does not require a "combined effects" review, but rather that the conditions be considered in combination. Because the staff hearing officer's order does so, relator's single objection is overruled.

{¶9} Following independent review pursuant to Civ.R. 53, we find the magistrate properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objection overruled;
writ denied.*

McGRATH and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. James G. Guy,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-711
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Tartan Textile Services, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 26, 2009

Schiavoni, Schiavoni, Bush & Muldowney, and Shawn R. Muldowney, for relator.

Richard Cordray, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} In this original action, relator, James G. Guy, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation and to enter an order granting said compensation.

Findings of Fact:

{¶11} 1. Relator has multiple industrial claims.

{¶12} 2. In one of his industrial claims (No. 01-304336), "depressive psychosis-moderate" is among the conditions allowed. This claim results from an injury that occurred on January 12, 2001 while relator was employed by respondent Tartan Textile Services, Inc. Relator was employed as a "route driver" at the time of this injury.

{¶13} 3. On October 31, 2007, relator filed an application for PTD compensation.

{¶14} 4. On February 22, 2008, at the commission's request, relator was examined by Elizabeth Mease, M.D., who issued a five-page narrative report dated March 4, 2008. Dr. Mease examined relator for the allowed physical conditions of the industrial claims.

{¶15} 5. On February 22, 2008, Dr. Mease completed a physical strength rating form on which she opined that relator is capable of sedentary and light work. Under "[f]urther limitations," she wrote "alternate positions as needed."

{¶16} 6. On February 21, 2008, at the commission's request, relator was examined by psychologist Marian Chatterjee, Ph.D., who issued a five-page narrative report.

{¶17} 7. On March 3, 2008, Dr. Chatterjee completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr. Chatterjee indicated by checkmark that "injured worker is capable of work with the limitation(s) / modification(s) noted below." Below, Dr. Chatterjee wrote:

This [injured worker]'s impairment stemming strictly from his work injury, would limit him to all but the most non-

stressful/non-demanding of jobs. His adaptive capacity is poor.

{¶18} 8. Following a May 14, 2008 hearing, a staff hearing officer ("SHO") issued an order denying the application. The SHO's order explains:

After a full consideration of the issue, it is the order of the Staff Hearing Officer that the Application for Permanent Total Disability Compensation benefits, filed 10/31/2007, is denied.

The Staff Hearing Officer has relied upon the medical opinions of Drs. Elizabeth Mease, M.D., and Marian Chatterjee, Ph.D., as well as, the vocational analysis made below.

* * *

On 02/21/2008 and 02/22/2008, the Injured Worker was examined by Drs. Elizabeth Mease, M.D., and Marian Chatterjee, Ph.D., regarding the extent and degree of the Injured Worker's present medical impairment due solely to the allowed physical and psychological conditions in this claim, respectively. Based upon Dr. Mease's objective physical findings, the medical history as provided by the Injured Worker, and review of the relevant medical records, she concluded that the Injured Worker has physical work restrictions due to his industrial claims, but that he was not permanently and totally disabled from all gainful employment. She further opined the Injured Worker could still perform sustained remunerative employment of light and sedentary work levels. She added that the allowed conditions had reached a level of maximum medical improvement and that the allowed physical conditions had resulted in a whole person impairment of 10%.

The Injured Worker was also evaluated by Dr. Marian Chatterjee, Ph.D., regarding the Injured Worker's instant Application. Dr. Chatterjee opined that the Injured Worker has the residual psychological functional capacity to perform some sustained remunerative employment. She indicates that the Injured Worker's impairments would limit him to all but the most non-stressful, non-demanding of jobs, and also opined that the Injured Worker's adaptive capacity is poor.

* * *

Based on the findings and opinions of Drs. Mease and Chatterjee, the Staff Hearing Officer concludes that when all the allowed conditions are considered, the Injured Worker retains the residual functional capacity to perform sustained remunerative employment at the sedentary and light work levels, physically and some sustained remunerative employment, as limited per Dr. Chatterjee's opinion.

* * *

Because the Injured Worker's medical impairment is not, by itself, dispositive of the issue of whether the Injured Worker is permanently and totally disabled, it is now necessary to consider the Injured Worker's non-medical disability factors, i.e., age, education, and work experience.

* * *

The Injured Worker is currently 62 years of age, having been born on 05/13/1946. The record reflects that the Injured Worker quit school in either the eighth or ninth grade because "he did not like it"; however, the Injured Worker is also noted to have subsequently secured his G.E.D. Therefore, the Injured Worker is deemed to have the equivalent of a high school diploma and will be considered to have a "High School Education or Above" for vocational analysis purposes.

The Injured Worker's employment history has consisted of the following: From 1963-1982, the Injured Worker worked at Youngstown Steel Door, first as a welder, then as a supervisor. The Injured Worker indicates on his Application that he welded steel box car doors and as a supervisor, he was "in charge of anywhere from six to sixty men."

From 1982-1982, the Injured Worker worked for Tabbaka Construction as a welder-burner. The Injured Worker indicates on his Application that he welded and burned heavy plate and I-beams for construction; that he used welding and burning machines; that he would burn-weld anything to do with building a building.

From 1982-1983, the Injured Worker worked for Schneider Trucking as an over-the-road semi-truck driver delivering goods. Sometimes he would unload the truck. He would use a hand dolly and pump jack.

From 1983-2001, the Injured Worker worked for the Employer of Record as a delivery driver/route salesman. The Injured Worker indicates on his Application that he would load trucks, deliver goods to customers, pick up dirty laundry, floor mats, uniforms, and mops.

No other employment history was noted.

The job duties for these positions, as stated by the Injured Worker on his Application, were reviewed. The Injured Worker was not present at this hearing to offer any supporting or clarifying testimony regarding this Application.

The Staff Hearing Officer finds that it is the generally accepted principle that while age may be a barrier to employment, it is never a complete bar to employment. Her[e], the Injured Worker has approximately three years remaining in the work force prior to reaching the traditional age of retirement, 65. The Staff Hearing Officer finds that the Injured Worker could avail himself of these additional years to secure, short-term skill training or on-the-job retraining, to perform sustained remunerative employment at a light and/or sedentary nature. And since the Injured Worker already possesses the residual functional capacity to perform sustained remunerative employment of a sedentary and/or light work level, this additional learning and/or retraining could be acquired while the Injured Worker was working during these additional three years. However, the Staff Hearing Officer acknowledges that as an individual approaches advanced age, the ability to adapt to new situations and/or work in competition with others, is affected.

Given these findings, the Staff Hearing Officer concludes that the Injured Worker's age would be considered a neutral factor in any evaluation of the Injured Worker's ability to work.

The Staff Hearing Officer concludes that the Injured Worker retains the intellectual capacity to perform unskilled positions at the sedentary and light work levels, as well as, to be

retrained for positions in the semi-skilled through skilled work levels.

By definition, the Injured Worker has a "high school education or above" which, unless otherwise established, would indicate that the Injured Worker possesses the abilities to perform semi-skilled work. By the Injured Worker's description of his job duties, the Staff Hearing Officer concludes that the Injured Worker has performed skilled work in prior positions. He lists technical skills (welding and burning), as well as, supervisor skills among his abilities.

The Staff Hearing Officer concludes, therefore, that the Injured Worker's educational level would constitute a positive employment factor in any evaluation of his ability or inability to work.

Further, since the Injured Worker has demonstrated the intellectual capacity to perform semi-skilled work in prior positions, the Staff Hearing Officer concludes that the Injured Worker's employment history would also be viewed as a positive employment factor in any evaluation of the Injured Worker's ability to work.

The Injured Worker last worked on 01/12/2001, per his Application, approximately 7 1/2 years ago. Since that time, there is no indication that the Injured Worker has completed any type of vocational retraining or additional schooling or attempted to secure any specialized training, certificates, or licenses.

Given the passage of seven plus years and the absence of evidence to establish that the Injured Worker has reasonably attempted to improve his employability through education and/or participation in a structure retraining program, the Staff Hearing Officer finds that the Injured Worker has not exhausted all avenues for returning to the work force. In this regard, the Staff Hearing Officer finds the decision in State ex rel. Cunningham v. Ind. Comm. (2001), 91 Ohio St. 3rd 261, to be instructive. Therein, it was stated that it is not "unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve rehabilitation potential." (Id. at p. 262). Continuing, the Ohio State Supreme Court stated that while extenuating circumstances can excuse a claimant's non-

participation in re-education or retraining efforts, "Claimant's [sic] should no longer assume that a participatory role, or lack thereof, will go unscrutinized." (Id. at p. 262).

Based on the above findings, the Staff Hearing Officer concludes that when the Injured Worker's non-medical disability factors are considered in conjunction with the medical restrictions and limitations as opined by Drs. Mease and Chatterjee, the Injured Worker retains the capacity to perform sustained remunerative employment at the sedentary and light work levels.

Medically, the Injured Worker retains the ability to do sedentary and light level work. The Injured Worker's non-medical disability factors favor employability. The Staff Hearing Officer, therefore, concludes that the Injured Worker has the ability to do, or to be trained to do, entry-level work at the sedentary and light work levels.

The Staff Hearing Officer concludes that the Injured Worker is not permanently and totally disabled from all sustained remunerative employment; specifically, Injured Worker's disability is not total.

The Staff Hearing Officer relies upon the Injured Worker's age, education, work experience, and retained sedentary and light work capability and concludes that the Injured Worker has not established by a preponderance of the evidence that he is unable to engage in any sustained remunerative employment.

{¶19} 9. On July 10, 2008, the three-member commission mailed an order denying relator's request for reconsideration of the SHO's order of May 14, 2008.

{¶20} 10. On August 18, 2008, relator James G. Guy, filed this mandamus action.

Conclusions of Law:

{¶21} Two issues are presented: (1) whether the commission violated Ohio Adm.Code 4121-3-34(D)(3)(i) when it determined relator's residual functional capacity,

and (2) whether the commission abused its discretion in its consideration of the nonmedical factors.

{¶22} The magistrate finds: (1) the commission did not violate Ohio Adm.Code 4121-3-34(D)(3)(i), and (2) the commission did not abuse its discretion in its consideration of the nonmedical factors.

{¶23} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶24} Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications.

{¶25} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications.

{¶26} Ohio Adm.Code 4121-3-34(D)(3) is captioned "Factors considered in the adjudication of all applications for permanent and total disability."

{¶27} Ohio Adm.Code 4121-3-34(D)(3)(i) states:

In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

{¶28} The commission, through its SHO, relied upon the reports of Drs. Mease and Chatterjee in determining relator's residual functional capacity which is defined at Ohio Adm.Code 4121-3-34(B)(4):

"Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained

performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

{¶29} In one of the early paragraphs of the SHO's order, the SHO acknowledges that Dr. Mease opined that relator can perform "light and sedentary work levels." In the same paragraph, the SHO acknowledges that Dr. Chatterjee limits relator to "all but the most non-stressful/non-demanding of jobs," and also opined that the injured worker's "adaptive capacity is poor."

{¶30} In the next paragraph, as quoted above, the SHO states:

* * * [T]he Injured Worker retains the residual functional capacity to perform sustained remunerative employment at the sedentary and light work levels, physically and some sustained remunerative employment, as limited per Dr. Chatterjee's opinion.

{¶31} In the paragraph in which relator's age is addressed, the SHO explains that relator has approximately three years remaining in the workforce prior to reaching the traditional retirement age of 65 years. After explaining that relator could avail himself of those years to retrain, the SHO states:

* * * And since the Injured Worker already possesses the residual functional capacity to perform sustained remunerative employment of a sedentary and/or light work level, this additional learning and/or retraining could be acquired while the Injured Worker was working during these additional three years. * * *

{¶32} The "residual functional capacity" is simply referred to as the ability to perform "sedentary and/or light work level." There is no mention of the psychological restrictions at that point in the order.

{¶33} In the concluding paragraphs of the order that follow a lengthy discussion of the nonmedical factors, the SHO's order is again less precise at stating the residual functional capacity earlier found.

{¶34} In three of the last four paragraphs of the SHO's order, residual functional capacity is referred to simply as "sedentary and light work levels" or "sedentary and light work capability."

{¶35} Here, relator seems to suggest that the SHO's description of residual functional capacity in terms of physical capacity rather than in terms of both physical and psychological capacity is evidence of a violation of Ohio Adm.Code 4121-3-34(D)(3)(i). The magistrate disagrees.

{¶36} The SHO made it clear early in the order that residual functional capacity included Dr. Chatterjee's limitation "to all but the most non-stressful/non-demanding of jobs," and that relator's "adaptive capacity is poor." In the magistrate's view, that the SHO failed to repeat Dr. Chatterjee's limitations every time residual functional capacity is referred to in the order does not compel this court to conclude that Dr. Chatterjee's limitations were not included in the SHO's determination of residual functional capacity.

{¶37} In his brief, relator claims that the SHO determined relator to be capable of sustained remunerative employment "from a physical standpoint and separately capable of sustained remunerative employment from a psychological standpoint." (Relator's brief, at 3.) Relator further claims that the SHO looked at the physical and psychological components of the claims "independently," rather than in combination as the rule requires. *Id.* at 4. A review of the order simply fails to support relator's argument.

{¶38} Turning to the second issue, Ohio Adm.Code 4121-3-34(B)(3) sets forth the commission's definitions relating to the vocational factors.

{¶39} Under Ohio Adm.Code 4121-3-34(B)(3)(c) captioned "Work experience," the following definitions are found:

(iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

{¶40} Relator's challenge to the commission's analysis of the nonmedical factors is contained in the following paragraph of relator's brief:

Additionally, Relator believes that the Staff Hearing Officer did not adequately explain how the restrictions imposed by both the physical and psychological aspects of the claim allow the Relator to obtain sustained remunerative employment when considering the Relator's disability factors. Specifically, the Relator is a 62 year- old individual with only a ninth-grade education with a GED. The Relator basically worked as a laborer his entire life. Therefore, he had no transferable skills.

Id. at 4.

{¶41} Relator has failed to identify any abuse of discretion in the nonmedical analysis. Moreover, that relator has no transferable skills from his previous jobs does not mandate a PTD award. *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139.

{¶42} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

 /s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).